

Before the
POSTAL REGULATORY COMMISSION
WASHINGTON, DC 20268-0001

Rules on Changes and Corrections
to the Mail Classification Schedule

Docket No. RM2015-6

PUBLIC REPRESENTATIVE COMMENTS

(December 24, 2014)

On November 14, 2014, the Commission issued a Notice of Proposed Rulemaking in this docket to prescribe new rules and to revise existing rules relating to Postal Service proposals for material changes and corrections to its product offerings in the Mail Classification Schedule (MCS).¹ Interested persons may submit comments no later than December 24, 2014, 30 days after the November 24, 2014 date of publication of the Notice in the Federal Register, 79 Fed. Reg. 69781.

I. BACKGROUND

The current Commission regulations in 39 CFR subpart E, 3020.90 *et seq.* permit the Postal Service to submit to the Commission “corrections to product descriptions” in the MCS but that “do not constitute a proposal to modify the market dominant product list or the competitive product list as defined in §3020.30....” Other current rules for

¹ Notice of Proposed Rulemaking on Changes and Corrections to the Mail classification Schedule, November 14, 2014 (Notice).

modification of the product lists provide for filing requests by the Postal Service, users of the mail, and the Commission, in Subparts B, C, and D of Part 3020, respectively.

Commission experience with the rules has shown there is a procedural gap for handling MCS changes more significant than minor corrections but that do not rise to the level of product list modifications. The Commission's Notice explains that notices designated by the Postal Service as minor corrections filed pursuant to §3020.90 have required additional questioning by the Commission to ensure the changes are truly minor corrections or to determine if they require additional consideration and analysis. The proposed rules are intended to eliminate the current rules gap by providing an avenue for the Postal Service to submit notices of material changes to product descriptions that fall into the current gap that are neither a modification nor a minor correction of the product lists.

The relevant rules were implemented by Order No. 43 in 2007.² As the problems created by the gap became apparent after Order No. 43, the Commission gradually recognized the problem and planned to add rules above the level of simple corrections to the MCS. According to the Commission's Notice, since Order No. 43 there have been several docketed cases when the Postal Service's filed correction proposals admittedly did not fit within either of the two alternative rules available. Notice at 5. On February 8, 2011, the Commission recognized in Order NO. 667, Docket No. MC2013-8, that a proposed modification pursuant to §3020.90 and 91 relating to a

² Docket No. RM2007-1, Order Establishing Ratemaking Regulations for Market Dominant and Competitive Products, October 29, 2007 (Order No. 43).

change in the method of calculating bundle and pallet charges for co-mailed flats did not fit within any section of the rules. *Id.* at 7.

Later the same year in 2011, the Postal Service filed a correction notice pursuant to §3020.90 to narrow the letter prohibition for Commercial First-Class Package Service to cover only the Commercial Base portion of the product. The Public Representative's comments filed in that case recognized the procedural gap and asked the Commission for rules to address that gap. Recognizing the problem, the Commission indicated that it would consider new rules to be applicable above the level of correction. *Id.* at 6-7. More recently, on February 14, 2013, in Docket No. MC2012-26,³ the Postal Service's notice pursuant to § 3020.30 to offer enhanced services at competitive post office box service locations was acknowledged by the Commission as not fitting within either set of rules. *Id.* at 5-6. The Commission said,

Enhanced competitive Post Office Box service is neither a new product necessitating a filing under subpart B nor a minor technical correction to an existing product necessitating a filing under subpart E. However, the enhanced services introduce significant product features. To promote transparency, Commission rules should provide a clear path for the Postal Service when it seeks to add or eliminate a significant product feature. The Commission intends to initiate a rulemaking to amend its rules to accommodate such filings. Order No. 1657 at 23.

The proposed rules in this docket should provide the clear path envisioned by the Commission to make significant product changes.

³ Docket No. MC2012-26, Order on elective Filing Regarding Post Office Box service Enhancements, February 14, 2013, Order No.1657.

II. DISCUSSION

The Public Representative fully supports establishing rules to provide for changes to product descriptions that fall between modifications of the product descriptions and simple corrections of the product lists. However, some modifications to the proposed rules are suggested below.

The potential problems created by the procedural gap were not unexpected. Commenters on the original rules leading up to Order No. 43 addressed the potential problem. As the Commission explains in its Notice, commenters McGraw-Hill and Valpak expressed concern that without Commission review or public comment, substantial changes might be made under the guise of minor corrections. Notice at 4. Parties adversely affected would have no opportunity to raise the issue until the change was made and that post-implementation review would be inadequate to forestall abuse. *Id.* The undersigned, then commenting in that docket on behalf of the public interest for the Commission's Office of the Consumer Advocate was also concerned that incremental changes might be made under the guise of small corrections to a product that could collectively amount to a modification of the product list without significant Commission review or customer input with potentially adverse effects on customers.⁴ For instance, the comments of Office of the Consumer Advocate at the time argued:

The Commission rules, as proposed, may contain a gap that will enable the Postal Service to change substantively its market-dominant

⁴ Docket No. RM2007-1, Office of the Consumer Advocate Comments in Response to Order No. 26 Proposing Regulations to Establish a System of Ratemaking, September 24, 2007 (OCA Comments).

and competitive product descriptions with a shortened notice period of 15 days and without provision for public comment.

It would be beneficial if the Commission elaborated on the meaning of the term “correction.” A correction may simply be a change in a numbering scheme to accommodate the insertion of additional information or a spelling correction. However, the term “correction” might be interpreted more broadly as allowing the Postal Service to change a product description in a way that has substantive impact under the guise of a correction. For example, assume that postal operations change such that Standard Mail carrier route pieces could be processed more efficiently if the minimums were changed from the existing volume of 200 pieces per mailing to 225 pieces per mailing. The change, which might be claimed a “correction” because it does not change the product list, may have a significant impact on mailers entering Standard Mail carrier route mail. Even more onerous, suppose that the Postal Service chose to modify or eliminate price categories or entry levels in a particular product description. Separate price categories or entry levels are not separate products. Updates of far-reaching substantive consequences might be labeled as mere “corrections” under the proposed rules and could be changed on 15 days’ notice without opportunity for comment.

There is no specific provision for the Postal Service to make changes to the list of product descriptions that have substantial substantive impact.⁵ What may appear as a seemingly small insignificant change may have major impacts on mailers and their mailing behavior. Unless more specific guidance is provided by the Commission, the Postal Service may be able to make substantive changes to price categories or entry levels of products simply by changing product descriptions in ways that are neither corrections nor additions or subtractions of products from the product list.

Section 3020.1 (Applicability) states, “Once established, the Mail Classification Schedule may be modified subject to the procedures specified in this part.” However, the above-mentioned types of modifications are not provided for in this part. The Commission should, therefore, for clarification, make provision in the rules for those types of

⁵ Similarly, while the current rules provide for proposed changes to the product lists by users or the Commission (§3020.50 and §3020.70), they do not provide for proposed substantive changes to product descriptions.

changes to the product descriptions that are neither changes in products nor corrections to the lists, but are somewhere in between; those that may effectuate substantive changes in terms of service or availability of the products offered by the Postal Service. OCA Comments at 15-17.

Upon Commission consideration of the comments, Order No. 43 added §3020.92 to provide opportunity to comment on whether the so-called minor changes are inconsistent with §3542 but retained the 15 day period for Commission review. This offered the opportunity to inform the Commission if proposed minor corrections might have substantive impact requiring review. It did not resolve the concerns about corrections having substantive impact.

A. PROPOSED RULES

The proposed rules would establish a new category for a change in product lists to fit between a modification of product lists subject to approval under section 3642 and correction of an error in a product description. Section 3642 does not contemplate error corrections of the product lists, only additions or transfers of products listed on the MCS. Proposed Rules 3020.90, et seq.

The current rules do not require the Postal Service to provide any information to assist the Commission in approving corrections, but they do invoke the standard that the Commission will change the MCS if “not inconsistent with section 3642.” 39 CFR 3020.93. Without requiring the Postal Service to provide information in its notice of correction, the current rule implies that to correct a product on the product lists, the Commission shall give due regard to three factors listed in §3642(b)(3). They are: (A).

the availability and nature of enterprises in the private sector engaged in the delivery of the product involved; (B) the views of those who use the product involved on the appropriateness of the proposed action; and (C) the likely impact of the proposed action on small business concerns (within the meaning of section 3641(h)). The proposed rules eliminate the current reference to section 3642 but do not insert any other standard, statutory or otherwise, for permitting the change.

However, the proposed rules in §3020.90(c) would impose increased requirements upon the Postal Service to explain in its notice filed under proposed §3020.90: (1) why the proposed corrections do not constitute material changes to the product description for purposes of §3020.80, and (2) why the proposed corrections are consistent with any applicable provisions of title 39. This properly places the burden on the Postal Service to justify filing for a product list description correction. It also properly requires the Postal Service to justify that the change meets statutory requirements rather than relying upon Commission investigation and review without sufficient initial Postal Service explanation to determine that the filing is consistent with applicable provisions of title 39. See Notice at 13. This approach to expand the input required of the Postal Service is consistent with other current rules for filings to modify product lists. *Id.*

The proposed rules in §3020.90 *et seq.* eliminate the current statement in the rules that the Commission will make the change if “not inconsistent with section 3642.” 39 CFR 3020.93(a). Rather, the proposed rule simply lists, in section 3020.91, *Docket and notice*, and section 3020.92, *Commission Review*, the “actions” that the

Commission will take upon filing of the notice. Thus, there is to be no explicit statement of the basis on which the Commission will authorize the correction. The Public Representative proposes that the better course would be to state in §3020.92(b) that the Commission would approve the proposed corrections, subject to editorial corrections, if “not a material change to the product descriptions,” thus assuring it does not fall under section 3020.80, and is “consistent with the provisions of title 39, subject to editorial corrections.”

In addition, proposed rule §3020.92 eliminates the statement in the current rule that the Commission “shall” make the change “to coincide with the effective date of the proposed change,” 39 CFR 3020.93(a). This, together with the absence of any timeline for action in proposed §3020.92, removes the Commission’s present indication that the change will be made to coincide with the effective date of the proposed change. It further eliminates any suggestion that the Commission may act on the notice within the 15 day notice period prior to the effective date of the proposed correction. This has the effect of providing the Commission additional time to act without appearing to contravene its own rule, but it injects ambiguity about the Commission’s intended action time. It is not clear whether the Commission intends to act on proposed corrections within 15 days or that, if it does not, the change will be made to coincide (perhaps retroactively, if necessary) with the effective date of the proposed change. Also unclear, is the effect on the MCS if the Commission fails to act on a correction notice (not a request) filed under §3020.90 within 15 days of the planned effective date.

Proposed Rules §3020.80, *et seq.*

The proposed Postal Service filing requirements for material product description changes under §3020.80 are, properly, more extensive than the information requirements under proposed §3020.90, *et seq.* Besides requiring the Postal Service to provide a rationale for the proposed changes in section 3020.81(a), section 3020.81(b) would require separate explanations in support of requests to change market dominant products and competitive products.

For market dominant products under proposed §3020.81(b)(1), the Postal Service must explain why the changes are “not inconsistent with each requirement of 39 U.S.C 3622(d) and part 3010” of the Commission’s rules. Notice at 18. These provisions relate to maintenance of the price cap rather than consistency with section 3642. Similarly, the proposed rule for competitive products, §3020.81(b)(2), requires the Postal Service to explain why the changes will not result in a violation of section 3633 or part 3015 of the Commission’s rules. These provisions also relate to requirements for rates and the degree by which they cover attributable costs. It should be noted that Section 3642 neither requires new market dominant product to comply with price cap provisions nor cost coverage standards. A competitive product must comply initially with rate provisions in §3633 and cover attributable costs and may not be subsidized by market dominant products and cover an appropriate share of institutional costs. The proposed rate provisions are important standards to meet for review of material changes in product descriptions, and the public representative

strongly supports the Commission's consideration through Postal Service explanations of the rate implications of material changes in product descriptions.

Just as for corrections to product description under section 3020.90, the Commission does not indicate what standard of review shall be applied for its approval of requests for material changes to a product description. Proposed rule in §3020.83 styled Commission Review, simply lists the actions the Commission may take, but lists no standard for review of the request.

The Commission's Notice says that whether changes in product descriptions fall under §3020.80 rules will be the degree to which the alteration affects the "characteristics of the product." Notice at 9. Some changes may affect the characteristic so much so that a new product is created; other times the impact on the characteristics may be minimal, or in the case of a correction, have no change in the product whatsoever.

The current rules for modification of product lists require a demonstration that the change is in accordance with chapter 36 of title 39, 39 CFR 3020.32(a). New rules in §3020.80 for material changes of product descriptions propose a more limited analysis. They would require the change to be not inconsistent with and comply with the objectives of §3622 or does not violate §3633 for market dominant or competitive products, respectively.

The proposed rules winnow down the currently required considerations for new products or transfers of products under 3642(b)(3). That section provides that the Commission shall give due regard to three factors listed in §3642(b)(3). They are: (A).

the availability and nature of enterprises in the private sector engaged in the delivery of the product involved; (B) the views of those who use the product involved on the appropriateness of the proposed action; and (C) the likely impact of the proposed action on small business concerns (within the meaning of section 3641(h)). The proposed rules only would require the Postal Service to “describe the impact that the change will have on users of the product and on competitors.” §3020.81(c), Notice at 18. Thus, for material changes in the product descriptions, the Commission reduces and changes the analysis required under section 3642. To measure the impact of the change on users and competitors of the product, proposed rule §3020.81(c) only requires the Postal Service to provide an explanation for only part of the requirements under 3642.

The proposed rules do not require the Postal Service to discuss either the “views of those who use the product on the appropriateness of the proposed action” (§3642(b)(3)(B)) or “the likely impact of the action on small businesses concerns” (§3642(b)(3)(C)) that the Commission shall consider in making a decision under section 3642 for a change in product lists. The Notice does not explain the Commission’s reasons for eliminating two of the considerations required by 3642(b)(3) when ruling on a notice to change product descriptions.

The Public Representative respectfully suggests that the Commission broaden §3020.81(c) to also require Postal Service discussion in its filings of the “views of those who use the product on the appropriateness of the proposed action,” and “the likely impact of the material change on small business concerns (within the meaning of

section 3641(h).” Section 3020.1(c) would therefore read: “Describe the views of those who use the product on the appropriateness of the proposed action and the impact that the changes will have on users of the product and on competitors and on small business concerns.”⁶

This suggested addition will better take into account the hybrid nature of any material change in product lists that may, over time, adjust products by increments, and thereby alter the product through changes in the description so that the product itself is modified. These additions are intended to protect the product lists from erosion to the detriment of users of the product and small businesses.

B. Proposed Lists of Potential Commission Action after Review

The rules proposed in §3020.92 and §3020.83 present the potential actions the Commission may take after review of Postal Service Notices or Requests by listing six potential Commission actions. The lists of potential action are identical.⁷ The Notice proposes to include them at the end of their respective sections. Because they are identical, except that one applies to requests and the other applies to notices, the Commission might consider in the interests of clarity and economy of rules, placing them into one section 3020.100 styled Commission Review and Action.

⁶ The addition of this part of the section 3642 requirements does not include its primary analysis regarding the Postal Service’s market power.

⁷ The identical lists are as follows: Approve the proposed corrections, subject to editorial corrections; reject the proposed corrections; provide the Postal Service with an opportunity to amend the proposed corrections; direct the Postal Service to make an appropriate filing under a different subpart; initiate further proceedings, or direct other action that the Commission considers appropriate.

III. CONCLUSION

The Public representative hereby submits the foregoing comments for the Commissions consideration.

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